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No. 10-56

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

REINAUER TRANSPORTATION COMPANIES, LLC,
REINAUER TRANSPORTATION COMPANIES, LP,
REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY,
LLC AND REINAUER MANAGEMENT COMPANY, INC.,

Petitioners,

v.

GEORGE BROWN,

Respondent.

On Petition For A Writ of Certiorari to the Court of Appeals of New York

REPLY BRIEF FOR PETITIONERS

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August 18, 2010

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PETITIONER'S REPLY BRIEF

In the petition for certiorari, Reinauer Transportation Companies, LLC ("Reinauer"), demonstrated a split of authority among the lower courts over whether a departure from the proximate cause standard is authorized by FELA/Jones Act which creates uncertainty for litigants and encourages forum shopping, making this issue suitable at this time for consideration by this Court. Reinauer also established that the Court in *Norfolk Southern Railway Co. v. Sorrell*, in declining to resolve this issue on which certiorari had not be granted, noted that the issue of the substantive content of the causation standard is indeed significant that it merits this Court's consideration when fully briefed in the appropriate case. (549 U.S. 158, 164 (2007)) Resolution by this Court of the issues presented by Reinauer's petition, i.e., (1) whether the language "in whole or in part" of the FELA and Jones Act eliminated the common law requirement that a plaintiff prove proximate cause so that damages are to be awarded in FELA/Jones Act cases brought pursuant to a relaxed "even the slightest" standard which is not set forth in the language of the statute, and (2) whether admittedly inapplicable ANSI standards may be substituted for what was promulgated by the U.S. Coast Guard resulting in a finding of negligence *per se* and dismissal of the defense of contributory negligence without any evidence or finding that a U.S. Coast Guard requirement was violated, is necessary so uniformity in the application of the federal statutory law embod-

ied under the FELA/Jones Act can be restored. *See Morange v. States Marine Lines*, 398 U.S. 375, 402 (1970) ("Federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country'").

Respondent George Brown's ("Brown") opposition to the petition disregards the split of authority among the lower courts over whether a departure from the proximate cause standard is authorized by the statute and, in an attempt to justify the result in this case, posits the notion that the "in whole or in part" language of FELA, incorporated into the Jones Act, has been interpreted by this Court to mean that an employer is liable to an employee if its negligence was *even the slightest* cause of the *damages* claimed by the employee. Respondent also asserts the instant case is not a proper vehicle for this Court to resolve whether *Rogers*[1] has been incorrectly interpreted as holding the statutory language "in whole or in part" abrogated the common law requirement of proximate cause because the issue at trial was proof of *damages*. But this case perfectly illustrates the enormity of the problem associated with *any* departure from the common law requirement of proximate cause and, as a result, is an appropriate vehicle for the Court to consider the substantive question of whether FELA and the Jones Act embody the proximate cause standard as to causation and damages.

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[1] *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957).

A. THE OBJECTED-TO JURY CHARGE, IN RELIANCE ON *ROGERS*, EMBODIED THE INCORRECT STANDARD

Over Reinauer's objection (Pet. App. 117a-118a, 170a-171a, 188a-189a) the trial court gave a jury instruction that erroneously employed the same "even the slightest language" that sharply divided this Court in *Sorrell*. *See Sorrell*, 549 U.S. 158, 172-77 (Souter, J, concurring), *id.* at 178 (Ginsburg, J, concurring). Compounding the problem, the instruction applied to plaintiff's burden of *proving damages* since Reinauer's liability had already been decided by the court on the basis of inapplicable ANSI standards. The lower Court's erroneous and objected-to instruction at the damages-only trial relieved Brown of his burden under the Jones Act of proving that Reinauer's negligence was the proximate cause of his damages by requiring Brown to prove nothing more than that Reinauer's negligence was a "slight" cause, in combination with other causes including naturally occurring conditions, of Brown's damages. Pet. App. 138a-140a. In the courts below, as well as in its Petition for Certiorari, Reinauer argued the "in whole or in part" language of the FELA/Jones Act was erroneously invoked to reduce Brown's common law burden of proving proximate cause with respect to *damages*—the only issue relevant at the damages-only trial conducted in this case. The trial court, having accepted Respondent's jury instruction based on an erroneous reading of *Rogers*, refused to instruct the jury that Brown had the burden of

proving Reinauer's negligence proximately caused his damages. Pet. App. 119a. The court also rejected Reinauer's proposed jury instruction which would have required Brown to prove his damages were proximately caused by Reinauer's negligence, i.e. upon a jury finding that there existed "a direct and unbroken chain of causation between the injury and the consequences alleged." Pet. App. 170a-171a.

B. THE QUESTION OF WHETHER PROXIMATE CAUSE IS THE PROPER STANDARD UNDER THE FELA/JONES ACT IS EQUALLY PROBLEMATIC CONCERNING LIABILITY OR DAMAGES

While it is clear that in the instant case, as well as others, the disputed interpretation of *Rogers* as eliminating the common law requirement of proximate cause has been applied to the issue of damages, this does not in any meaningful way undermine the importance of reviewing the proper meaning of the phrase "in whole or in part" and whether *Rogers* has been properly read as holding that this phrase abrogated the common law requirement of proximate cause—either for proving liability or damages. Indeed, that *Rogers* has been erroneously interpreted as eliminating the common law element of proximate cause as to both liability *and damages* surely does not diminish the need for review and a clear statement by the Court as to the meaning of the phrase "in whole or in part" in FELA and Jones Act law suits in the light of an

obvious split of authority on these issues, which affect important industries and are recurring. On the contrary, Reinauer's petition, and Brown's opposition which states not only that *Rogers* reduced a FELA/Jones Act plaintiff's burden of proving causation, but also reduced his burden of proving damages, demonstrate the heightened need for review by this Court. Further, the rationale as to why the interpretation of *Rogers* as eliminating the common law requirement of proximate cause is erroneous is precisely the same whether applied to the issues of liability or damages. As a result, Respondent's assertion that this case is not a proper vehicle for resolving whether *Rogers* has been incorrectly interpreted as reducing the common law requirement of proximate cause is not meaningful.

C. RESPONDENT'S OPPOSITION TO THE PETITION IS BASED ON THE INCORRECT NOTION THAT *ROGERS* REDUCED PLAINTIFF'S BURDEN OF PROVING DAMAGES

Respondent argues that the standard for proving damages in FELA/Jones Act cases, based upon the phrase "in whole or in part" as purportedly held in *Rogers*, is whether the employer's negligence was "even the slightest" cause of the damages, expressly arguing, as the Appellate Division, Third Department held, that "[R]ogers . . . rejected the application in FELA cases (and therefore in Jones Act cases) of the notion of proximate cause embod-

ied in Petitioner's requested jury instructions."[2] *Opp. p. 9-10.* Respondent concedes this was what was charged to the jury at trial, over Reinauer's repeated objections that said standard was error in that it eliminated the proximate cause requirement for proof of recoverable damages, and was not embodied in the FELA/Jones Act.[3] Accordingly,

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[2] Petitioner notes Respondent's Brief in Opposition ("Opp.") is internally inconsistent with respect to the allegation that Reinauer failed to raise and/or properly preserve the issue of whether the FELA/Jones Act eliminated the common law requirement that damages be proven by the proximate cause standard. While claiming Reinauer did not object to the jury instructions "on proximate cause grounds" Respondent argues "[R]ogers rejected the application in FELA (and therefore in Jones Act cases) of the notion of *proximate cause embodied in Petitioner's requested jury instructions,*" (Opp. p. 9) thereby conceding Reinauer in fact objected to the jury instructions on proximate cause grounds.

[3] Reinauer consistently argued to the trial court, and on appeal to the Appellate Division, that error was committed because the jury was instructed, in reliance upon *Rogers*, that damages could be awarded if Reinauer's negligence was "even the slightest cause" since proof of proximate cause of damages was required. Pet. App. 117a-118a, 146a-147a, 170a-171a, 188a-189a. Indeed, as Reinauer argued and proposed in its jury instructions, which were rejected by the trial court, damages could only be awarded if proven proximately. Defendant requested this proximate cause instruction: "For an injury to be the cause of an alleged consequence there must be an unbroken chain of connection between the consequence and the injuries which you find plaintiff actually sustained. You are not to award damages for any injury or condition from which plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence in the case that such injury or condition was proximately caused by the accident in question." Pet. App. 170a-

while Respondent claims, for a variety of equally flawed reasons, that this case does not properly bring up for review the issue of whether the phrase "in whole or in part" and the interpretation given by some courts to the decision in *Rogers* served to reduce the common law standard with respect to causation of damages, there is no question that this issue was the predominate issue at the damages-only trial, and properly preserved for appellate review.[4] Indeed, since the sole issue presented at trial was whether Reinauer's negligence caused Brown's reflex sympathetic dystrophy or not, the erroneous legal standard imposed by the trial court based upon its improper reading of *Rogers* was determinative of the outcome of trial and thus the Court's error eliminating the proximate cause requirement was harmful to Reinauer.

Respondent's opposition, in fact, crystallizes Reinauer's argument that the erroneous interpretation of *Rogers* as eliminating the common law

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171a. These proposed instructions were correct and tracked well-established caselaw. *See Blier v. United States Lines Co.*, 286 F.2d 920, 925 (2d Cir.1961)("The proper charge in a Jones Act case with respect to proof of damages was '. . . whether the . . . negligence was a *proximate cause of injury*'. To be a proximate cause there must be a direct causal connection between the negligence and the injury."); *see also Mosley v. Cia. Mar. Adra, S. A.*, 314 F.2d 223, 228 (2d Cir. 1963).

[4] Respondent fails to address in its opposition the fact that Reinauer's repeated objections to the erroneous jury instructions (Pet. App. 117a-118a, 146a-147a, 170a-171a, 188a-189a) appropriately preserved the issue for review pursuant to the Civil Practice Law and Rules of the State of New York. *See* CPLR §§ 4110-b; 4017 and § 5501(3)(A).

requirement of proximate cause as to liability has been further extended and applied by courts to the issue of proof of liability for damages, as occurred in the instant case.[5] *See, e.g., Marchica v Long Island R.R.*, 31 F.3d 1197 (2d Cir. 1994) ("[I]n the FELA context the traditional concept of proximate cause is supplanted by the less stringent standard that there be some causal relation, no matter how slight, between the injury and the [employer]'s breach of duty.)[6] It is respectfully urged that the petition demonstrates deep division over the effect

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[5] Respondent asserts Reinauer is barred from challenging the "even in the slightest" standard because it did not make that challenge in its appeal from the motion court's grant of summary judgment on the issue of negligence *per se* for alleged violation of 46 CFR § 42.15-75(d). This is incorrect since Brown's fall from the deckhouse roof of Reinauer's vessel clearly resulted in "injury" (as opposed to damages) with respect to the discrete issue raised in the summary judgment motion, i.e., liability for allegedly violating the Coast Guard regulation. Reinauer was not, however, precluded from correctly arguing at the damages-only trial (as it did) that Brown had to prove his damages were proximately caused by Reinauer's negligence and having argued that at trial, is not barred from raising that issue on appeal, which naturally brings up the substantive content of the causation standard

[6] *Cf., Wharf v. Burlington N. R.R.*, 60 F.3d 631, 639 (9th Cir. Wash. 1995) (Plaintiff in FELA case must prove damages were proximately caused by defendant's negligence); *Vickers v. Chiles Drilling Co.*, 822 F.2d 535, 540 (5th Cir. La. 1987)(In Jones Act case, only proximately caused damages may be awarded); *Baker v. Baltimore & O. R. Co.*, 502 F.2d 638, 644 (6th Cir. Ohio 1974); *Dale v. Baltimore & Ohio Railroad Company*, 552 A.2d 1037, 1041-1042 (1989) ("The decision in *Rogers v. Missouri P.R. Co., 'relates to liability, and not, implicitly, to damages.'*")

of *Rogers* since the courts below in this case, as well as other courts, have not only interpreted that decision as eliminating the common law requirement of proximate cause with respect to liability, but have extended it to eliminate the requirement that an employee establish the employer's negligence proximately caused the damages sought.

D. RESPONDENT INCORRECTLY CLAIMS REINAUER'S OBJECTION TO THE JURY INSTRUCTIONS WAS ON THE ISSUE OF APPORTIONMENT OF DAMAGES

Respondent's assertion that Reinauer's objections to the jury charge went to the issue of apportionment, as opposed to proximate cause, is flatly incorrect. As discussed in the Petition for Certiorari at pp. 35 and 35 (fn. 12), apportionment of damages was not the issue at trial. Reinauer sought to establish Brown did not suffer reflex sympathetic dystrophy ("RSD") as a result of the accident or ensuing treatment and that condition was not the cause of his alleged disabling pain symptoms, while Brown sought to establish that he did develop RSD as a result of the accident and/or treatment rendered thereafter, which was disabling. Reinauer's evidence established that polyneuropathy, which was independent of RSD and which was brought on by either diabetes or alcohol abuse unaffected by the accident, could explain Brown's pain symptoms and also precluded a medical diagnosis of RSD, which is a diagnosis of exclu-

sion. No argument was presented at trial that pre-existing conditions were aggravated by the accident or combined with traumatically caused conditions to disable Brown. To the extent case law discussing apportionment was cited in briefs to the trial court and/or Appellate Division, it was exclusively to persuade the courts that "even the slightest" was not the applicable law of damages in FELA/Jones Act cases since in addition to requiring proof of proximately caused damages, courts have repeatedly held that in cases brought pursuant to the FELA/Jones Act, an employer is not responsible in damages for unrelated conditions. The trial court, rejecting Reinauer's proposed instructions, erroneously charged the jury not only was Reinauer liable for damages if its negligence was "even the slightest" cause, but also to the extent its negligence "operate[d] in combination with . . . some natural cause" in producing Brown's damages. Pet. App. 138a-140a.

While Reinauer argued to the courts below that its liability instruction—given at a damages-only trial—erroneously eliminated the proximate cause requirement, it also tried to provide context by reference to apportionment case law intended to instruct the trial court that the FELA/Jones Act did nothing to eliminate the common law principle that an employer could only be held liable for damages it proximately caused. Further, the proposed instructions provided by Reinauer were in all aspects correct: it is well established that under FELA plaintiff has the burden of establishing the

proportion of damages caused by the accident, as opposed to other unrelated conditions. *See Shupe v. New York Cent. System*, 339 F.2d 998, 999 (7th Cir. 1965); Prosser, Law of Torts, § 45, n. 229 (2d ed. 1955).

E. FELA/JONES ACT JURISPRUDENCE INSTRUCTS THAT SUBSTANTIVE ELEMENTS OF AN EMPLOYEE'S CLAIM ARE GOVERNED BY REFERENCE TO COMMON LAW, UNLESS EXPRESSLY ABROGATED IN THE STATUTE

Respondent's opposition fails to address Petitioner's arguments establishing the substantive elements of FELA/Jones Act claims are determined "by reference to the common law" unless the statute contains "express language to the contrary" (*Norfolk Southern Railway Co. v. Sorrell* (549 U.S. 158, 165-66 (2007)) and that in enacting FELA, Congress expressly altered the common law only to the extent that it ". . . abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of that of comparative negligence, and prohibited employers from exempting themselves from FELA through contract . . ." (*Conrail v. Gottshall*, 512 U.S. 532, 543 (U.S. 1994); *Sorrell*, 549 U.S. at 168) but did not eliminate the requirement that an employee prove the employer's negligence proximately caused the injury and damages. Further, in relying on *Rogers* in support of the claim that this Court has interpreted the FELA as

eliminating the requirement of proximate cause of liability and damages, Respondent includes the language from *Rogers* which makes plain the limits of its reach: "*the test of a jury case* [in an FELA case] is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers*, 352 U.S. at 506; Opp. p. 5 (emphasis added). Respondent does not in any way attempt to challenge the fact that in *Rogers* the jury was instructed it *must find* proximate cause in order to hold defendant liable (352 U.S. at 520, 523 (1957)), and that the Court referred to its prior decisions recognizing that FELA requires the defendant's negligence must have been a "contributory proximate cause" in order for plaintiff to recover. *Id.* at 506, n.11 (citing *Coray v. S. Pac. Co.*, 335 U.S. 520, 523 (1949)); *id.* at 507, n.13 (citing *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 435 (1949)). Indeed, Brown offers no substantive response to the petition to the extent it establishes *Rogers* did not hold that FELA eliminated the common law element of proximate cause with respect to either liability or damages. Pet. pp. 26-33. In simplest terms, Respondent fails to provide any substantive or otherwise meaningful defense of his claim that *Rogers* must be read as having eliminated the common law requirement that plaintiff prove defendant's negligence proximately caused damages.

Respondent claims that Reinauer has not presented compelling reasons for review of the issue

presented by the Court, arguing that there is "nearly universal consensus of the courts that the FELA and Jones Act establish a relaxed standard of causation" and conflict between federal courts and state courts on this issue "[i]s not meaningful." Opp. pp. 19, 31. The assertion that *Rogers* has universally been read as eliminating the requirement of proximate cause in FELA/Jones Act cases contradicts the concurring opinion in *Sorrell* of Justice Souter, in which he was joined by Justices Scalia and Alito, recognizing that "[r]ecently, some courts have taken the view that Rogers smuggled proximate cause out of the concept of defendant liability under FELA",[7] while "several State Supreme Courts have explicitly or implicitly espoused the opposite view."[8] In addition to the cases cited in Justice Souter's concurring opinion, the fact that three justices of the Court expressed the opinion that *Rogers* did not eliminate the element of proximate cause undermines Respondent's claim of "nearly universal consensus."[9] Respondent also glosses over the

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[7] Citing *Holbrook v. Norfolk Southern. R. Co.*, 414 F.3d 739, 741-742 (7th Cir. 2005); *Summers v. Missouri Pacific R. Co.*, 132 F.3d 599, 606-607 (10th Cir. 1997); *Oglesby v. Southern Pacific Transp. Co.*, 6 F.3d 603, 606-609 (9th Cir. 1993).

[8] Citing *Marazzato v. Burlington No. R. Co.*, 817 P.2d 672, 674-675 (1991); *Gardner v. CSX Transp., Inc.* 498 S.E.2d 473, 483 (1997); *Snipes v. Chicago Central & Pacific R. Co.*, 484 N.W.2d 162, 164 (Iowa 1992); *Chapman v. Union P. Railroad*, 467 N.W.2d 388, 395 (1991).

[9] The "split of authority regarding the Supreme Court's use of the phrase 'even the slightest' in *Rogers*" was also expressly acknowledged in *Jordan v. Burlington N. Santa Fe*

fact that following *Sorrell* at least two district courts have found the reasoning articulated by Justice Souter compelling and have held proximate cause remains an element in FELA cases. *See Lafferty v. Norfolk S. Ry. Co.*, 2009 U.S. Dist. LEXIS 106442, 10-11 (N.D. Ohio Nov. 12, 2009) and *Jarrett v. CSX Transp. Inc.*, 208 U.S. Dist. LEXIS 86256 (N.D. Ohio September 10, 2008). Respondent also incorrectly describes as "dicta" the holding of the Supreme Court of Utah in *Raab v. Utah Ry. Co.*, 221 P.3d 219 (Utah 2009) that ". . .reading *Rogers*' ambiguous language as eliminating the proximate cause requirement would be contrary to the Supreme Court's approach in FELA" and ignores the fact that other state courts have expressed confusion on the issue. *See, e.g., McNeel v. Union Pac. R.R.*, 276 Neb. 143, 150 (Neb. 2008); *Hall v. Norfolk S. Ry. Co.*, 2007 U.S. Dist. LEXIS 69630 (N.D.Ga. Sept. 18, 2007); *Mills v. CSX Transp., Inc.*, 300 S.W.3d 627, 634 (Tenn. 2009); *In re Global Sante Fe Corp.*, 275 S.W.3d 477 (Tex. 2008). Respondent does not, however, dispute that the federal statutes embodied in the FELA and Jones Act are to be applied uniformly in state courts (*See Urie v. Thompson*, 337 U.S. 163, 174 (1949)), making his assertion that there is no compelling reason to review this issue which is the subject of dispute between justices of the Court, as well as numerous state and federal courts, appear disingenuous.

R.R. Co., 2009 Tenn. App. LEXIS 8, 46-48 (Tenn. Ct. App. Jan. 15, 2009); *cert denied* ___ U.S. ___, 130 S. Ct. 2094, 2010 U.S. LEXIS 3472 (U.S., Apr. 19, 2010).

F. ANSI STANDARDS WERE IMPERMISSIBLY USED TO FIND A VIOLATION OF 46 CFR 42.15-75(d)

Respondent does not dispute that ANSI standards may not serve as a basis for a finding of negligence *per se*, but claims his liability expert, David Cole, did not premise his opinion that 46 CFR 42.15-75(d) was violated upon the expert's determination that ANSI standard A14.3 was violated and only used the ANSI standard as "a factual predicate for his opinion" that the regulation was violated. This is, quite simply, a distinction without a difference. That Cole used as "a factual predicate for his opinion" the standards set forth in ANSI A14.3 and that the motion court, despite Reinauer's objection that ANSI could not serve as a basis for a statutory or regulatory violation since not enacted or adopted by a governmental entity, accepted Cole's opinion in total had the inescapable effect of holding Reinauer liable on a theory of negligence *per se*, with the further result that the defense of comparative negligence as provided for under the Jones Act was dismissed as a matter of law, although no regulation or statute was shown to have been violated by Reinauer, as opposed to non-binding ANSI standards. By conceding Cole's reliance on ANSI, Respondent further concedes that 46 CFR 42.15-75(d) itself contains no standards or particulars except that "satisfactory means" be provided, and cannot as a result be the basis for a finding of negligence *per se*. But for his reliance upon the inapplicable ANSI standards,

Cole could not have reached the conclusion 46 CFR 42.15-75(d) was violated, and accordingly, all issues of liability were removed from the jury's consideration in this Jones Act law suit based upon the motion Court's application of inapplicable ANSI standards to decide, as a matter of law, Reinauer's liability.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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